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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

GARY ROSS HINESON,

Defendant and Appellant.

2d Crim. No. B263420
(Super. Ct. No. 2012011683)
(Ventura County)

Gary Ross Hineson appeals a judgment following conviction of two counts of oral copulation with a child 10 years old or younger. (Pen. Code, § 288.7, subd. (b).)[1] We modify the judgment to award Hineson 56 days of presentence custody and conduct credit, but otherwise affirm.

[1] All statutory references are to the Penal Code unless stated otherwise.

FACTUAL AND PROCEDURAL HISTORY

For many years, A.P. and her mother N.P. lived in a Simi Valley neighborhood. In 2007 or 2008, Hineson moved into the house next door to the P. family, along with his two sons, daughter-in-law, and grandchildren. The families became friendly and A.P. became friends with Hineson's granddaughter, B.H. A.P. and B.H. watched television in Hineson's bedroom and, at times, A.P. would stay overnight in the Hineson residence.

A.P. testified that during one sleepover, Hineson entered the bedroom, removed her pants, and moved his tongue "up and down" on her vagina for 5 to 10 minutes. Several weeks later, Hineson repeated the act when he and A.P. were inside a trailer parked in his driveway. At the time, A.P. did not inform anyone of these incidents because she feared "getting in trouble."

In the spring of 2010, the P. family moved from the Simi Valley neighborhood. Near the end of 2011, A.P. informed her mother of Hineson's acts. At the time, A.P. and her mother were watching a television program regarding sexual exploitation of children.

On February 8, 2012, Simi Valley Police Detective Brian Young interviewed A.P. The interview was videotaped and the prosecutor played the video-recording at trial. A.P. described Hineson's acts of oral copulation on her in the bedroom and in the trailer. A.P. stated that Hineson would "touch [her] in some

places where [she did not] really like to be touched" and that he would "put his tongue down there." A.P. stated that she was six or seven years old at the time of the sexual acts and that the acts occurred on five or six occasions.

Pretext Calls

In March 2012, N.P. made two pretext telephone calls to Hineson that were monitored and recorded by Detective Young. At trial, the prosecutor played the audio-recordings. During the first telephone call, N.P. asked Hineson if he performed oral copulation on A.P. or if he had "sex with her." N.P. also inquired if Hineson had any sexually transmitted disease. Hineson denied any sexual acts with A.P. and also stated that he did not have a sexually transmitted disease. He also asked where the P. family was living and if N.P. could telephone him later because he was then driving.

During the second telephone call, Hineson repeated that he did not have any sexually transmitted disease. He stated that he and A.P. were "very close," but that he did not orally copulate her. When N.P. informed Hineson that A.P. believed she was no longer a virgin, Hineson replied: "[T]here's no way in hell . . . she doesn't have her virginity."

Telephone Interview

On March 15, 2012, Detective Young telephoned Hineson and recorded the conversation. Hineson initially denied

touching A.P. inappropriately. He then admitted that he orally copulated A.P. in the bedroom on one occasion and that it was a mistake that he regretted--"a stupid 30 second whatever thing." Hineson denied that he orally copulated A.P. in the trailer. The prosecutor played the interview recording at trial.

Hineson testified at trial and denied committing any sexual acts against A.P. He explained his admissions during his police telephone interview were his attempt "to get [Detective Young] off my back" and "to end the conversation" by admitting "something [Young] wanted to hear."

B.H. testified that she never saw Hineson enter the bedroom while the girls were sleeping. B.H. also did not see Hineson touch A.P. inappropriately or take her into the trailer.

Conviction and Sentencing

The jury convicted Hineson of two counts of oral copulation with a child 10 years old or younger. (§ 288.7, subd. (b).) The trial court sentenced him to two consecutive prison terms of 15 years to life, imposed a $5,000 restitution fine, a $5,000 parole revocation restitution fine (suspended), an $80 court security assessment, and a $70 criminal conviction assessment. According to a court minute order, but not the oral pronouncement of judgment, the court awarded Hineson 49 days of presentence custody credit. (§§ 1202.4, subd. (b), 1202.45, 1465.8, subd. (a); Gov. Code, § 70373.)

Hineson appeals and contends that: 1) the trial court erred by permitting evidence of the two pretext telephone calls; 2) the trial court was unaware of its discretion to impose concurrent prison terms; 3) his sentence violates constitutional commands against cruel and unusual punishment; and, 4) the trial court erred by not awarding presentence custody and conduct credits in the pronouncement of judgment.

DISCUSSION

I.

Hineson argues that the trial court erred by permitting evidence of the two pretext telephone calls, over defense objection, because the evidence is hearsay, irrelevant, and unduly prejudicial. (Evid. Code, §§ 1200, 1220, 350, 352.)[2] He also asserts that the court abused its discretion by allowing the jury to decide if his statements constitute admissions.

The trial court did not err because Hineson's statements are admissible pursuant to section 1220. It provides: "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity." Section 1220 covers all statements of a party, whether or not the statements may be characterized as

[2] All statutory references in *I.* are to the Evidence Code.

admissions. (*People v. Horning* (2004) 34 Cal.4th 871, 898, fn. 5.) The evidence here consisted of Hineson's statements, he was the declarant, the statements were offered against him, and he was a party to the action. (*Id.* at p. 898; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1049.) The requirements of section 1220 are satisfied. Accordingly, the hearsay rule does not make the statements inadmissible. (*Ibid.*) The court's ruling to allow the evidence is correct on this legal theory regardless of any theory relied upon by the court. (*Ibid.*)[3]

We also reject the argument that the trial court abdicated its function by permitting the jury to decide whether Hineson's statements were admissions. We interpret the court's comments to mean that the jury would ultimately determine the reasonable inferences to be drawn from the evidence in its function as factfinder. (*People v. Merriman* (2014) 60 Cal.4th 1, 63 [rejecting claim that trial court abdicated its responsibility regarding admissibility of evidence by ruling that it would allow the jury to "sort it out"].)

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[3] Many of Hineson's statements are not hearsay statements because they were not offered for the truth stated therein. (§ 1200 [definition of "hearsay evidence"].) These include his general conversation with N.P. and his statements that he does not have a sexually transmitted disease. We also assume that Hineson does not complain of his statements denying that he molested A.P.

Moreover, the probative value of the statements was not outweighed by any undue prejudice pursuant to section 352. Evidence of Hineson's statements was probative because it involved his response to accusations and there was limited danger of undue prejudice. (*People v. Edwards* (2013) 57 Cal.4th 658, 713 [evidence is substantially more prejudicial than probative if it poses an intolerable risk to the fairness of the proceedings or the reliability of the outcome].) "'A trial court's exercise of discretion under section 352 will be upheld on appeal unless the court . . . exercised its discretion in an arbitrary, capricious, or patently absurd manner.'" (*People v. Suff* (2014) 58 Cal.4th 1013, 1066.)

II.

Hineson contends that the trial court was not aware of its discretion to impose concurrent prison terms. He relies upon these statements by the trial judge: "[S]ometimes I have to do things that seem unreasonable because that's my job . . . . [Hineson's acts] command serious punishment and there's no exception because of someone's age . . . . But I do recognize that he's an old man." Hineson asserts that his age and insignificant criminal record are mitigating factors that the sentencing court should have considered but believed it could not.

Contrary to Hineson's claim, the trial court was fully aware of its sentencing discretion and chose to impose terms to be

served consecutively. The probation report referred to rule 4.425 of the California Rules of Court describing the criteria affecting concurrent or consecutive sentences. The probation officer recommended consecutive sentences in part because the sexual offenses were independent and occurred at different times and places. At sentencing, the trial judge indicated that he read and considered the probation report and intended to impose the probation officer's recommended sentence. In imposing sentence, the court explained that the offenses were "independent of one another, as they occurred at different times and places, they involved separate acts, and they weren't so closely connected to be indicative of a single period of aberrant behavior."

The trial court possesses discretion to impose concurrent or consecutive terms. (*People v. Coelho* (2001) 89 Cal.App.4th 861, 886.) Imposition of a consecutive term is a sentencing choice for which the court must state reasons. (§ 1170, subd. (c); *Coelho*, at p. 886.) The court's reference to the factors set forth in California Rules of Court, rule 4.425 ["Criteria affecting concurrent or consecutive sentences"] reflects the court's awareness of its sentencing discretion. "[H]ad the court believed that consecutive terms were mandatory, it would not have stated reasons for their imposition since none would have been required." (*People v. Leung* (1992) 5 Cal.App.4th 482, 501.)

We also presume the trial court understood and applied the law. (*People v. Coddington* (2000) 23 Cal.4th 529, 644, overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) "[W]e presume . . . that the court knows and applies the correct statutory and case law [citation] and is able to distinguish admissible from inadmissible evidence, relevant from irrelevant facts, and to recognize those facts which properly may be considered in the judicial decisionmaking process." (*Ibid.*) Here, the trial court indicated that it was aware of Hineson's age. The court could have, but was not required to consider that circumstance in Hineson's sentence. (Cal. Rules of Court, rule 4.425(b) [generally, trial court may consider any circumstances in aggravation or mitigation in imposing consecutive or concurrent sentences].) In sum, the court did not abuse its discretion by imposing consecutive sentences.

III.

Hineson argues that his aggregate 30-years-to-life sentence violates the constitutional commands against cruel and unusual punishment pursuant to the United States and California Constitutions. (U.S. Const., Amend. VIII; Cal. Const., art. I, § 17.) He points out that he was 78 years old at the time of sentencing, has an insignificant criminal record, and was assessed to have a minimal likelihood of reoffending.

Hineson has forfeited this issue because he did not raise this claim in the trial court. (*People v. Johnson* (2013) 221 Cal.App.4th 623, 636.)

Forfeiture aside, in reviewing a cruel and unusual punishment claim, we examine whether a punishment is grossly disproportionate to the crime for Eighth Amendment purposes. (*People v. Johnson*, *supra*, 221 Cal.App.4th 623, 636.) For purposes of the California Constitution, a sentence is cruel or unusual if it is so disproportionate to the crime committed that it shocks the conscience and offends fundamental notions of human dignity. (*Ibid.*)

Fixing the penalty for crimes is the exclusive province of the Legislature, which is in the best position to evaluate the gravity of different crimes and to make judgments among different penological approaches. (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494.) Only in a rare case could a court declare that the length of a sentence mandated by the Legislature is constitutionally excessive. (*Ibid.*) A defendant must overcome a "considerable burden" to demonstrate that his sentence is disproportionate to his level of culpability. (*People v. Wingo* (1975) 14 Cal.3d 169, 174.)

Hineson's sentence is not grossly disproportionate to his crime for Eighth Amendment purposes. (*Rummelle v. Estelle* (1980) 445 U.S. 263, 284-285 [life sentence for three nonviolent

crimes is constitutional]; *Harmelin v. Michigan* (1991) 501 U.S. 957, 1004 [life without possibility of parole for possession of 672 grams of cocaine is constitutional].) Moreover, disproportionality has little or no relevance in non-capital cases. (*Harmelin*, at p. 965.)

Nor is Hineson's sentence disproportional under *People v. Dillon* (1983) 34 Cal.3d 441, 479. Dillon, an immature youth, panicked and killed a guard at a marijuana farm, where Dillon and his friends had planned to steal marijuana. (*Id.* at pp. 451-452.) Our Supreme Court found Dillon's life sentence for murder excessive, considering his immaturity and moral culpability. (*Id.* at pp. 482-483, 488.) The successful disproportionality analysis in *Dillon*, however, is an exception and an "exquisite rarity." (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196.)

An insignificant criminal record and the age of the defendant "are far from determinative" when the seriousness of the crime and the circumstances surrounding its commission substantially outweigh these factors. (*People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 845.) "[G]reat deference is ordinarily paid to legislation designed to protect children, who all too frequently are helpless victims of sexual offenses." (*In re Wells* (1975) 46 Cal.App.3d 592, 599.) Here Hineson abused a position of trust and committed two sexual offenses against a child less

than 10 years old who considered him a grandfather figure. The sentence imposed, although significant given his present age and state of health, is not "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.)

IV.

Hineson contends that the trial court erred by not awarding presentence custody and conduct credits during oral pronouncement of judgment. The Attorney General concedes that Hineson is entitled to 49 days of presentence custody credit and 15 percent of that amount (seven days) as conduct credit.

Hineson's conviction pursuant to section 288.7, a felony punishable by imprisonment in state prison for 15 years to life, qualifies as a conviction of a "violent felony" within section 667.5, subdivision (c). Section 667.5, subdivision (c)(7) includes "[a]ny felony punishable by death or imprisonment in the state prison for life" as a "violent felony." A 15-year-to-life term is the equivalent of a life sentence for purposes of section 667.5, subdivision (c). (*People v. Thomas* (1999) 21 Cal.4th 1122, 1127, 1130.) A defendant convicted of a "violent felony" is entitled to conduct credit equal to 15 percent of the actual days of custody. (§ 2933.1, subd. (c).) Hineson is thus entitled to seven days of conduct credit.

We modify the judgment to award Hineson 49 days of presentence custody credit plus seven days of presentence conduct credit for a total of 56 days. We order the trial court to amend the minute order and abstract of judgment accordingly and forward certified copies of the minute order and abstract of judgment to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

Jeffrey G. Bennett, Judge

Superior Court County of Ventura

Jean Matulis, under appointment by the Court of Appeal, for Defendant and Appellant.

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